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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL THEATRES CORPORATION,
PETITIONER,

v.

BERTHA BUILDING CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
THE QUESTIONS PRESENTED	2
THE STATUTES INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	6
1. Respondent Had No Constitutional or Statutory Right to a Trial by Jury of the Venue and Jurisdiction Issues Raised by Petitioner's Defense of the Statute of Limitations	6
2. Even If Respondent Had Been Entitled to a Jury Trial Petitioner Was Entitled to a Directed Verdict on the Undisputed Facts Established in the District Court	10
3. A Dismissal on the Grounds of the Bar of the Statute of Limitations is not a Dismissal on the Merits under Rule 41(b)	16
CONCLUSION	21
APPENDIX	1a-67a

CITATIONS

CASES: PAGE

Bank of the United States v. *Donnally*, 8 Pet. 361 . . . 18, 19
Bolten v. *General Motors Corporation*, 180 F. (2d) 379 (7th Cir. 1950), *cert. den.* 340 U. S. 813 20
Brent v. *The Bank of Washington*, 10 Pet. 596 . . . . 18, 19

Eastman Co. v. *Southern Photo Co.*, 273 U. S. 359 . . . . . 6, 10, 11

Gibbs v. *Buck*, 307 U. S. 66 6
Gilbert v. *David*, 235 U. S. 561 . . . . . 6, 7
Giusti v. *Pyrotechnic Industries*, 156 F. (2d) 351, *cert. den.* 329 U. S. 787 16

Hartmann v. *Time*, 166 F. (2d) 127 (3rd Cir. 1948), *cert. den.* 334 U. S. 838 20

Mechanical Appliance Co. v. *Castleman*, 215 U. S. 437 . . . . . 6, 7

Paramount Pictures v. *Rodney*, 186 F. (2d) 111, 113, *cert. den.* 340 U. S. 953 16

Sibbach v. *Wilson & Co.*, 312 U. S. 1 20
Smith v. *Ford Gum & Machine Co.*, 212 F. (2d) 581 (5th Cir. 1954) 20, 21
Southern Photo Material Co. v. *Eastman Kodak Co.*, 224 Fed. 523 (N. D. Ga., 1915) 8
Steiner v. *20th Century-Fox Film Corporation*, 232 F. (2d) 190 16
Stokke et ux. v. *Southern Pac. Co.*, 169 F. (2d) 42 (10th Cir. 1948) 20

Texas & Pac. Ry. v. *Gulf, Etc., Ry.*, 270 U. S 266 . . . 6

United States v. *Nat. City Lines*, 334 U. S. 573 . . . 6, 10, 11
United States v. *Scophony Corp.*, 333 U. S. 795 . . . 6, 8, 10, 11, 12, 15
United States v. *Sherwood*, 312 U. S. 584 20

PAGE

Warner v. *Buffalo Drydock Co.*, 67 F. (2d) 540, *cert. den.* 291 U. S. 678 ..... 18, 19
Wetmore v. *Rymer*, 169 U. S. 115 ..... 6, 7

CONSTITUTION OF THE UNITED STATES:

Seventh Amendment 6

STATUTES AND RULES:

Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 15) 2, 3, 4, 9, 10, 13
Section 12 of the Clayton Act (38 Stat. 736, 15 U. S. C. § 22) 2, 3, 4, 8, 9, 10, 11, 15
Section 351 of the California Code of Civil Procedure 3, 4
Rule 41(b) of the Federal Rules of Civil Procedure 3, 5, 16, 17, 20
Section 13 of the New York Civil Practice Act 3
Section 1254(1) of Title 28, United States Code 2
Section 2072 of Title 28, United States Code 3, 20

AUTHORITIES:

2 Beale, Conflict of Laws § 450.11 18
3 Freeman on Judgments, § 1397 (5th Ed.) 18
Restatement, Judgments, § 49 18

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NATIONAL THEATRES CORPORATION, *Petitioner*, v. BERTHA BUILDING CORPORATION, *Respondent*.	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, National Theatres Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (Judges L. Hand, Chase and Hincks; Judge Hand dissenting) dated and entered on September 10, 1957. The judgment sought to be reviewed reversed a judgment of the District Court dismissing respondent's complaint as barred by the applicable statute of limitations. The case was remanded for a jury trial of that issue.

Opinions Below

The original opinion of the Court of Appeals and its opinion on re-hearing are reported in 248 F. (2d) 833.* The opinion

*There were two cases tried together on petitioner's defense of the statute of limitations. The plaintiff in the first case was Gumbiner Theatrical Enterprises, Inc., and in the second the respondent here, Bertha Building Corporation. Petitioner National Theatres Corporation was the only defendant in each case. On the petition for re-hearing in both cases the Court of Appeals reversed its original decision in the *Gumbiner Theatrical* case and affirmed the judgment of the District Court, dismissing the complaint.

of the District Court is reported in 140 F. Supp. 909. The findings of fact, conclusions of law and order of dismissal of the District Court are not reported. The opinion of the District Court, directing that the issue of the statute of limitations be tried to the court without a jury, is not reported. All of the foregoing are annexed hereto as an appendix to this petition (*infra*, pages 1-65a).

Jurisdiction

The judgment which is sought to be reviewed by this petition was dated and entered on September 10, 1957. Petitioner's timely motion for a re-hearing was granted. On November 7, 1957, the Court of Appeals rendered a second decision in which it adhered to its original decision.

The jurisdiction of this Court is invoked pursuant to the provisions of Section 1254 (1) of Title 28, United States Code.

The Questions Presented

1. Is a plaintiff entitled to a trial by jury of a defense of the statute of limitations where that defense turned solely upon the question whether defendant could have been sued in California under the venue and jurisdiction provisions of Sections 4 and 12 of the Clayton Act?

2. Was a motion picture exhibition company subject to suit under the anti-trust laws in the district where the alleged conspiracy was carried out, where its wholly-owned subsidiaries operated many of the motion picture theatres which constituted its business, where one of its general managers resided and maintained his office and where its other general manager and its officers, agents and employees were actively engaged in supervising and directing the operations of its theatres and the affairs of its theatre-operating subsidiaries?

3. When an action is dismissed as barred by the statute of limitations, does that dismissal constitute a dismissal on the merits and a bar to a second suit in another jurisdiction?

The Statutes Involved

The pertinent statutes and rules are Sections 4 and 12 of the Clayton Act (38 Stat. 731 and 736, 15 U. S. C. §§ 15, 22); Section 351 of the California Code of Civil Procedure; Rule 41(b) of the Federal Rules of Civil Procedure; and 28 U. S. C. § 2072; the texts of which are set out in the appendix to this petition (*infra*, pp. 66-67a).

Statement

Plaintiff-respondent commenced this action against the petitioner under the anti-trust laws in the Eastern District of New York on September 5, 1951. Respondent alleged that by reason of the activities of the petitioner and many others not named as defendants it was injured in its property and business of operating the Tower theatre in Los Angeles, California. It alleged that it operated the Tower theatre until July 4, 1935, and it is conceded that its cause of action accrued in California no later than that date. This action was commenced against the petitioner over sixteen years later. Petitioner is the only defendant, although a number of other companies, against which the statute of limitations had then run, including petitioner's California subsidiaries, were named as co-conspirators.

It is conceded that the statutes of limitations barred the suit as to petitioner if it could have been sued in California during the three years after the cause of action accrued on July 4, 1935. Section 13 of the New York Civil Practice Act provides that a plaintiff's cause of action is barred in New York if it is barred by the statute of limitations of the state in which the cause of action arose, here California. To escape the bar

of the statute, respondent contended that the running of the three-year California statute of limitations was tolled (1) for the period from July 4, 1935, to July 20, 1938, under Section 351 of the California Code of Civil Procedure by petitioner's alleged absence from the state and (2) for the period subsequent to July 20, 1938, by the pendency of *United States* v. *Paramount Pictures Inc., et al.* (Equity Number 87-273, Southern District of New York) by virtue of Section 5 of the Clayton Act.

On the motion of respondent, a separate trial of petitioner's statute of limitations defense was ordered on June 25, 1954. District Judge Rayfiel ordered that the trial should be had before the court without a jury, since the issue involved related solely to a question of venue, that is, whether petitioner could have been sued in California under Sections 4 and 12 of the Clayton Act. Trial was held on December 12-16, 1955, before the Honorable Clarence G. Galston, United States District Judge. On March 28, 1956, Judge Galston rendered his decision in which he held that petitioner had been amenable to suit in California throughout the period from July 4, 1935, to July 20, 1938, and dismissed the complaint as barred by the California statute of limitations.* Coincident with the filing of his opinion, Judge Galston also filed extensive findings of fact and conclusions of law with respect to petitioner's business activities in both California and New York.

Judge Galston's findings—which all three judges of the court below held not to be clearly erroneous—were to the effect that petitioner during all of the periods of time involved was engaged in the business of exhibiting motion pictures in California through a large number of theatres located there which were owned or leased and operated by its direct and

*In view of the decision on this point, it was unnecessary for the District Court to consider the question whether the statute of limitations had been tolled by the *Paramount* case, *supra*, and that question is not involved in this proceeding.

indirect wholly-owned subsidiaries. He found that petitioner carried on substantial business activities in California, both directly and through its wholly-owned subsidiaries, had agents and officers there, including the residence and office there of one of its two general managers, and that petitioner maintained constant supervision over and intervention in the affairs and activities of its theatre interests and its theatre-operating subsidiaries. The evidence upon which such findings were based not only was not contradicted by respondent but the complaint affirmatively alleged that petitioner, both directly and through its subsidiaries, was present in California carrying on business there and performing in California acts in furtherance of the conspiracy which is the gravamen of respondent's complaint.

On the appeal the court below held that respondent was entitled to a trial by jury on the issue whether petitioner had been amenable to suit in California from July 4, 1935, to July 20, 1938, in a treble damage action under the venue provisions of the anti-trust laws. Accordingly, it reversed the judgment of dismissal and remanded the case to the District Court for a trial of that issue to a jury. The court below recognized that any factual issues present here were identical with those which are usually presented when a defendant moves to dismiss for improper venue and acknowledged that such issues are traditionally passed upon by the court alone during or prior to trial rather than by a jury. It nevertheless held that under the provisions of Rule 41(b) of the Federal Rules of Civil Procedure a dismissal of the complaint as barred by the statute of limitations constituted a dismissal on the merits. The court below thus converted what had theretofore been a procedural defense into a defense on the merits. On the rehearing, the Court of Appeals conceded that the District Court might have dismissed without prejudice but adhered to its view that, since the order of dismissal as barred by the statute of limitations did not so provide, respondent was entitled to a jury trial of that issue.

Reasons for Granting the Writ

1. Respondent Had No Constitutional or Statutory Right to a Trial by Jury of the Venue and Jurisdiction Issues Raised by Petitioner's Defense of the Statute of Limitations.

The decision by the court below that respondent was entitled to a jury trial of the venue and jurisdiction issues raised by petitioner's statute of limitations defense presents important and novel problems in the administration of the anti-trust laws. It is a decision of an important question of federal law which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The decision is in conflict with numerous decisions of this Court treating with questions of jurisdiction and venue. *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437; *Wetmore* v. *Rymer*, 169 U. S. 115; *Gilbert* v. *David*, 235 U. S. 561; *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U. S. 266; and *Gibbs* v. *Buck*, 307 U. S. 66. It also runs counter to the rationale underlying decisions of this Court with respect to the jurisdiction and venue of the District Court in anti-trust cases. See *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359; *United States* v. *Scophony Corp.*, 333 U. S. 795; and *United States* v. *Nat. City Lines*, 334 U. S. 573.

Whether the California statute of limitations barred plaintiff's claim against petitioner turned upon one issue and only one issue, namely, could petitioner have been sued in California during the relevant periods under the Clayton Act.* The decision on the limitations defense followed from the decision on the venue issue. No magic attached to respondent's theory that it was entitled to a jury trial under the Seventh Amendment to the Constitution, or otherwise, merely because a resolu-

*The court below appears to have thought that the issue was whether petitioner was absent from the state. This, of course, is merely a different way of saying the same thing. If petitioner could have been sued in California, it follows that it was not absent from the state in the Clayton Act sense.

tion by the court of a jurisdictional issue resulted in the barring of respondent's claims in a particular jurisdiction.

This Court has held that these jurisdictional issues are to be determined by the court and that the parties are not entitled, as of right, to a jury trial. In *Gilbert* v. *David*, 235 U. S. 561, this Court said with respect to the adjudication of such issues (p. 563):

> "It is also insisted that the court erred in itself considering the testimony and in not submitting the issue to the jury. But while the court might have submitted the question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject."

The practice of having issues of fact relating to jurisdictional matters determined by the court was also approved in *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437. There the question before this Court was whether the defendant was doing business in Missouri for the purpose of suit in the Eastern District of Missouri. This Court stated that the Circuit Court "should have considered the question upon the *issues of fact raised*, as to the presence of the corporation in Missouri and the authority of the agent upon whom service had been attempted" (p. 445, emphasis ours).

In other cases this Court has noted that in the absence of statutory direction for procedure respecting issues of venue and jurisdiction, the mode of their determination is left to the trial court. *Gibbs* v. *Buck*, 307 U. S. 66, 71-72, and *Wetmore* v. *Rymer*, 169 U. S. 115, 121. And, of course, there is no statutory direction with respect to this matter in the Clayton Act.

There was no issue of fact raised at the trial in the District Court and decided by it that is not raised and decided daily by the judges of the District Court throughout the country in

deciding contested motions to dismiss for lack of jurisdiction and improper venue. As was said by Mr. Justice Frankfurter in his concurring opinion in *United States* v. *Scophony Corp.*, 333 U. S. 795, 819:

> "Whether a corporation 'transacts business' in a particular district is a question of fact in its ordinary untechnical meaning. The answer turns on an appraisal of the unique circumstances of a particular situation. And a corporation can be 'found' anywhere, whenever the needs of law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place. This again presents a question of fact turning on the unique circumstances of a particular situation, to be ascertained as such questions of fact are every day decided by judges."

That the issue of jurisdiction and venue is for the court alone was decided in the first reported decision rendered under Section 12 of the Clayton Act. *Southern Photo Material Co.* v. *Eastman Kodak Co.*, 224 Fed. 523 (N. D. Ga., 1915). In that case the defendant entered a traverse to the return of service of the marshal, appeared specially for the purpose of challenging venue, and denied that it had ever had an office or place of business or any agent or agency in the State of Georgia. Plaintiff contended that it was entitled to a jury trial of the questions presented. In holding that the matter was for determination by the court alone, the court said (pp. 523-24):

> "The question presented now for determination is whether or not this question as to whether the defendant was properly served should be heard by the court or must be tried by a jury. * * *
>
> "Upon the general question of whether, in the federal courts, the court should hear and determine such question or submit it to a jury, the cases of Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39

> L. Ed. 517, Green v. Chicago, etc., Railway Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, and Mechanical Appliance Co. v. Castleman, supra, are, in my opinion, controlling. True, the question is not distinctly and directly raised in these cases; but in each of them an issue like this was heard by the court, without a jury, and nowhere was the question even raised that such action by the court was illegal or improper in any way. It seems to me to be the settled practice so far as I can understand it. * * *"

There were no decisions to the contrary in interpreting Sections 4 and 12 of the Clayton Act prior to the decision of the court below.

The majority of the court below accepted petitioner's contention that, with respect to the bar of the California statute, the decision "depends upon whether National could have been sued by these plaintiffs in California before the California statute of limitations had run, and so comes down to a question of venue in respect to each of such suppositious suits." (248 F. (2d) 833, 835, Appendix, p. 4a).* The majority, however, then held that the "critical issue" was whether the statute bars the suits and that such "issue is not to be treated as merely one of venue" (Appendix, p. 4a). But can it be said that the tests of venue under Sections 4 and 12 of the Clayton Act differ with the exigencies of the case? Sections 4 and 12 of the Clayton Act—unchanged from the time of their enactment to the date this action was commenced—make no such distinction. There can be none.

The only question the District Court was called upon to try with respect to the bar of the California statute was whether petitioner could have been sued in California during the relevant three-year period. When the District Court held that venue

*Hereafter all references to the opinions of the court below are to the Appendix to this petition.

would have been proper, there was nothing open for decision. The bar of the statute followed as a matter of course. No separate factual or legal issue was presented. Thus, the statute of limitations defense, as such, in no way enlarged or altered the determinative issue whether petitioner could have been sued in California under Sections 4 and 12 of the Clayton Act.

What the District Court decided, therefore, was that the legal effect of petitioner's business activities in California constituted "transacting business" within the meaning of Section 12 of the Clayton Act and that it had an agent within that state within the meaning of Section 4. We think, in addition to all other considerations, that it would have been manifestly inappropriate to have allowed a jury to speculate upon such issues. What standards would the jury have applied in determining which activities of a corporation in a district constituted transacting business in contemplation of law? *Eastman Co.* v. *Southern Photo Co., supra, United States* v. *Scophony Corp., supra,* and *United States* v. *Nat. City Lines, supra,* make it abundantly clear that there is no hard and fast objective test to be applied. What constitutes transacting business and what relationship gives rise to the concept of agency within the meaning of the Clayton Act are questions that only the court properly can or should answer.

2. Even If Respondent Had Been Entitled to a Jury Trial Petitioner Was Entitled to a Directed Verdict on the Undisputed Facts Established in the District Court.

Apart from the question of respondent's right to a jury trial, the decision of the court below that petitioner's undisputed business activities in California did not, as a matter of law, constitute transacting business in that state so far departs from the recognized interpretations of Sections 4 and 12 of the Clayton Act as to call for an exercise of this Court's power of

supervision. It is petitioner's contention that no reversible error could have flowed from the denial of a jury trial because, on the record in the District Court and in line with controlling authorities, petitioner, in any event, would have been entitled to a directed verdict.

Such was the conclusion reached by Judge Learned Hand and noted in his dissenting opinion. He held that the decision below is directly contrary to the decision of this Court in *United States* v. *Scophony Corp., supra.* Basing his holding upon the evidence and the pertinent authorities, Judge Hand concluded (Appendix, p. 8a):

> "However, it seems to me that as on the evidence here at bar Judge Galston would have been bound to direct a verdict for the defendant if the case had been tried to a jury, Judge Rayfiel's error is immaterial. In short, I think that the defendant proved beyond dispute that it had been 'transacting business' in California throughout the critical period."

The foregoing statement is directly in line with the decisions of this Court holding that the venue provisions of Section 12 of the Clayton Act were intended to subject a corporate defendant to suit in a jurisdiction "if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character" (*Eastman*, 273 U. S. 359, 373); that by the enactment of Section 12 the Congress intended to substitute "practical business conceptions for the previous hair-splitting legal technicalities" (*Scophony*, 333 U. S. 795, 808); that the basic aim of the Congress had been to give a plaintiff the right "to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries" (*Nat. City Lines*, 334 U. S. 573, 583); and that "a foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or

even without retreating to its headquarters defeat or delay the retribution due" (*Scophony*, 333 U. S. 795, 808).

Yet the decision below requires a reinstatement of the very "hair-splitting" technicalities consistently condemned by this Court. As was further said by Judge Hand in his dissenting opinion (Appendix, p. 12a):

> "In conclusion it seems to me worth while to observe that, although the result of my brothers' reasoning will indeed require the defendant to defend on the merits actions arising under the Anti-Trust Acts, toward which the Supreme Court, especially of late, has shown particular favor, it does so at the expense of a precedent of the greatest value to large corporations doing a wide interstate business. I cannot see why, if what we are deciding is right, a corporation by doing its local business through subsidiary corporations over whom it retains supervisory control, will not compel those whom it may damage to sue in some district where it can be 'found,' as distinct from any one in which it 'transacts business.' If so, the whole purpose of the amendment to § 12 will be defeated."

We submit that the correctness of Judge Hand's conclusion is inescapable when examined in the light of the indisputable facts disclosed by the record here. It was admitted and the District Court found that throughout the entire period of time here involved petitioner was engaged in the business of exhibiting motion pictures through theatres which were owned or operated by its direct and indirect wholly-owned subsidiaries. Approximately two hundred such theatres were located and operated in California (Finding 4, Appendix, pp. 36-37a).

It was undisputed that Charles P. Skouras was employed as one of petitioner's general managers pursuant to contracts dated January 19, 1932, and June 13, 1935; that in about March, 1932, Mr. Skouras established his office and residence in Los Angeles; and that he resided in California and performed

his duties from his office there as a general manager of petitioner from 1932 to 1942 and as president and general manager from 1942 until his death in 1954 (Findings 5, 7 and 9, Appendix, pp. 37-39a).

Charles P. Skouras was an officer and director of all of petitioner's subsidiaries in California. He was also active in all phases of petitioner's business throughout the country. The performance by him of his duties and functions as an officer and director of petitioner's subsidiaries in California was pursuant to and required by his contracts as a general manager of petitioner (Findings 7, 8 and 13a, Appendix, pp. 38a, 41a).

With respect to these activities of Mr. Skouras alone, the District Court held as a matter of law that Mr. Skouras was an agent of petitioner in California within the meaning of Section 4 of the Clayton Act (Conclusion of Law 8, Appendix, p. 61a). The court below did not challenge that basic finding. Yet the evidence on this point alone would have entitled petitioner to a directed verdict under Section 4 of the Clayton Act.

In addition, Spyros P. Skouras, petitioner's other general manager, was its president until November, 1934, and executive vice-president until April, 1942. He worked in close association with his brother and co-general manager Charles. (Findings 6 and 8, Appendix, pp. 37-38a). Spyros P. Skouras made from six to eight extended business trips to California each year from 1932 to 1942 to supervise, manage and carry on the business of petitioner and its subsidiaries in California. Mr. Skouras engaged in a variety of business activities in California, such as inspecting theatre properties, consulting with personnel employed by subsidiaries, buying film for theatres, and the like (Findings 13b and 13c, Appendix, pp. 41-42a).

It was undisputed that other individuals, employed directly by petitioner or its subsidiaries, performed substantial services for petitioner in California and carried on extensive business

activities for it in that state (Findings 13d, 13e and 13h, Appendix, pp. 42-44a). Furthermore, as expressly noted in Judge Hand's dissent, many direct activities relating to the operation of theatres in California were performed by a wholly-owned subsidiary "agency" corporation acting as agent for petitioner (Findings 13j, 13k and 13l, Appendix, pp. 45-46a). These and many other activities were found as facts by the District Court and were in no way contradicted by respondent.

We emphasize that as to all of these findings of the District Court, all three judges of the Court below hold that they were not "clearly erroneous".

Respondent's case rested almost entirely upon the offer in evidence of statements made by petitioner in connection with pleadings filed in unrelated judicial proceedings to which respondent not only was not a party but with respect to which it took no position to its detriment or otherwise. In these other proceedings, petitioner for tax purposes, raised the question whether it was doing business in California (Findings 24-27, Appendix, pp. 50-52a). Respondent asserted that these statements constituted a so-called "judicial estoppel"*, despite the fact that no one testified and there was no evidence that petitioner did not actually carry on the business activities which were found by the District Court.

In the face of the overwhelming evidence with respect to petitioner's business activities in California the court below nevertheless held that the pleadings and statements in other cases (although not an estoppel) constituted admissions which raised "genuine questions of fact which could not properly be taken from the jury" (Appendix, p. 5a). We submit that the court below erred in not recognizing that the uncontradicted and undisputed evidence with respect to petitioner's

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*In his dissent Judge Hand considers this argument concerning "judicial estoppel" and holds that it is "plainly without foundation" (Appendix, p. 8a).

actual business activities in California, regardless of statements in any other case*, required the direction of a verdict if the trial had been held before a jury.

Under the circumstances present here it is unrealistic to attempt to distinguish petitioner's activities from those of its wholly-owned subsidiaries.' It is contrary to the practical, everyday business concepts which this Court has consistently followed in the construction and application of Section 12 of the Clayton Act; it is, indeed, contrary to the clear intent of the Congress in enacting Section 12.

We submit, moreover, that petitioner here stood in the same position as Scophony, the English corporation, in *United States* v. *Scophony Corp., supra.* Petitioner conducted its principal business in California, that is, the management and supervision of the affairs of its subsidiaries there, in the only way it was capable of conducting them, namely, by having a resident general manager in California and by sending officers and agents there to supervise the subsidiaries' affairs. We submit that petitioner acquired no immunity to suit in California under the anti-trust laws by exhibiting motion pictures in theatres operated by its subsidiaries rather than directly. Under any practical, everyday business concept of transacting business, petitioner carried on substantial business activities in California and was amenable to suit there under the anti-trust laws. No issue of fact which could have been open for de-

*With respect to these so-called admissions in other cases, it should be noted that (1) in all such cases petitioner appeared, answered and defended, (2) no decision was ever rendered with respect to petitioner's amenability to suit in California and no gain accrued to petitioner as a result of such statements, (3) respondent was not a party or privy to any party to any such proceeding, (4) there was no evidence that respondent so much as knew of the cases to say nothing of having acted in reliance upon any such admission and (5) none of the statements constituting these so-called admissions was made in the sixteen-year period from October, 1932, to 1948 (Finding 25, Appendix, p. 50a).

termination by a jury could have changed this ultimate decision.

In addition to all the undisputed activities of the petitioner, the affirmative allegations of respondent's complaint itself charged that petitioner was actually present in California, both directly and through its wholly-owned and controlled subsidiaries, and that it committed the acts complained of in that state. Such allegations caused the District Court to grant judgment on the pleadings as well as to dismiss the complaints on the factual issues before it. The court below, however, also rejected that basis of decision. In so doing its decision is in direct conflict with two decisions of the Ninth Circuit. *Steiner* v. *20th Century-Fox Film Corporation*, 232 F. (2d) 190, and *Giusti* v. *Pyrotechnic Industries*, 156 F. (2d) 351, *cert. den.* 329 U. S. 787, and in likely conflict with the decision of the Third Circuit in *Paramount Pictures* v. *Rodney*, 186 F. (2d) 111, 113, *cert. den.* 340 U. S. 953.

3. A Dismissal on the Grounds of the Bar of the Statute of Limitations is not a Dismissal on the Merits under Rule 41(b).

The decision of the Court below that plaintiff was entitled to a jury trial rests squarely upon its holding that, under Rule 41(b) of the Federal Rules of Civil Procedure, a dismissal on the limitations defense constitutes a final adjudication on the merits and bars plaintiff's claim everywhere, unless the order of dismissal specifically provides that it is without prejudice. Thus, in its original opinion, the court said (Appendix, p. 4a):

> "But though decision as to whether these suits are barred by the statute depends upon whether National could have been sued by these plaintiffs in California before the California statute of limitations had run, and so comes down to a question of venue in respect to each of such supposititious suits, the critical issue in the instant actions remains whether the statute bars the

> suits. That issue is not to be treated as merely one of venue. A determination of this defense has a reach and a finality not inhering in any decision as to venue. For if the defense of the statutory bar is sustained, the resulting judgment of dismissal operates as a final adjudication of the merits of the controversy: a decision as to venue, however, of course leaves the plaintiff free thereafter to seek an adjudication on the merits of his claim. F. R. C. P. 41(b)."

And on the re-hearing (Appendix, p. 16a):

> "We are unmoved by the petitioner's contention that we were wrong in asserting that a dismissal based upon a defense of the statute of limitations is an adjudication on the merits. Warner v. Buffalo Drydock Co., 2 Cir., 67 F. 2d 540, which is cited in support of that contention, we think is distinguishable. And moreover, it has been superseded by the clear mandate of Rule 41(b) of the Federal Rules of Civil Procedure which in its last sentence directly contradicts the holding of the *Warner* case. Although under the rule in a proper situation the District Judge may specify that his order be without prejudice, Judge Galston did not so qualify his order of dismissal."

Although, as the court below noted, the District Court might have provided for the dismissal of the action without prejudice, its asserted failure to do so becomes the basis upon which Judge Rayfiel is held to have committed error almost two years earlier when, on respondent's motion for a separate trial of the limitations issue, he ordered that the trial be to the court alone.

We submit that the construction of Rule 41(b) of the Federal Rules of Civil Procedure by the court below raises serious questions as to the validity of that Rule. It is a complete departure from prior precedent and is in conflict with decisions of other circuits. The issue is of importance in the administration of the Federal Rules and should be resolved by this Court.

The bar of the statute of limitations has traditionally been regarded as a purely procedural defense. Prior to the decision

of the court below, it was universally recognized that dismissal of a complaint as barred by limitations was not a dismissal on the merits which precluded a plaintiff from reinstituting his action in a forum in which it was not barred. *Bank of the United States* v. *Donnally*, 8 Pet. 361; *Brent* v. *The Bank of Washington*, 10 Pet. 596. See also 3 Freeman on Judgments, § 1397 (5th Ed.); Restatement, Judgments, § 49; 2 Beale, Conflict of Laws § 450.11.

Indeed, the leading modern federal case on the subject is the Second Circuit's own decision in *Warner* v. *Buffalo Drydock Co.*, 67 F. (2d) 540, *cert. den.* 291 U. S. 678. In that case plaintiffs brought an action in the Western District of New York to recover damages alleged to have been caused by the negligence of defendant's servants. Defendant denied negligence and pleaded as *res adjudicata* a decree in admiralty which had dismissed a libel previously filed by plaintiffs against the defendants in the Northern District of Ohio. The decree entered in the Ohio district court dismissed the libel on the ground that plaintiffs' action was barred by plaintiffs' laches in not instituting the libel within the two-year period allowed by the Ohio statute of limitations.

The trial court directed a verdict for the defendant on the ground that the earlier admiralty decree, although based upon the defense of the statute of limitations, was a judgment on the merits barring another action. In reversing the judgment below, the Court of Appeals (Judge Augustus N. Hand) said (p. 541):

> "A decision that the Ohio statute of limitations barred the remedy was not res judicata in an action to assert plaintiffs' rights in another forum. If the Ohio statute had extinguished the plaintiffs' rights, as in case of adverse possession of real property beyond the statutory period of limitation, the situation would be different. The decisions of the Supreme Court and the English cases all indicate that the judgment of the court of a foreign state which dismisses a cause of action because

> of the statute of limitations of the forum is not a decision upon the merits and is not a bar to a new action upon the identical claim in the courts of another state. This is the settled doctrine of the English courts. Harris v. Quine, L. R. 4 Q. B. 652; Huber v. Steiner, 2 Bing, N. C. 202; Williams v. Jones, 13 East. 439. The same rule has been applied by the Supreme Court."

After discussing the decisions of this Court in *Bank of United States* v. *Donnally, supra,* and *Brent* v. *The Bank of Washington, supra,* and other cases, Judge Hand continued (p. 542):

> "The Ohio decree does not fail to bar the remedy in the present action because it is not res judicata as to everything which it decided, but because it did not decide that the plaintiffs' claim was extinguished, but only that they could not sue in Ohio on account of the local statute of limitations."

After noting that the foregoing was the law of New York and of England, Judge Hand concluded (p. 543):

> "All the foreign court adjudicates as a fact is that the action has been brought after the expiration of the statutory period, and, as a matter of law, that the remedy is barred in that court. To be sure, courts might hold that, where a suit is brought in one jurisdiction and fails, the same defendant shall not be vexed by another action. But no such doctrine obtains where the prior decision has merely barred a remedy less extensive than that affirmed by the lex fori. As no rule of law prevents the prosecution of both remedies concurrently, it is hard to see why failure of one should preclude the other where the periods of limitation are different. In our opinion, the dismissal of the libel by the Ohio court was not a bar to the present action."

The decision by the court below, overruling, in effect, *Warner* v. *Buffalo Drydock Co.*, is in conflict with decisions in at least the Third and Seventh Circuits which hold that a

dismissal on the limitations defense is not a dismissal on the merits which precludes a second suit in another jurisdiction where the statute had not run. *Bolten* v. *General Motors Corporation*, 180 F. (2d) 379 (7th Cir. 1950), *cert. den.* 340 U. S. 813, and *Hartmann* v. *Time*, 166 F. (2d) 127 (3rd Cir. 1948), *cert. den.* 334 U. S. 838. The same principle has been stated by the Tenth Circuit. See *Stokke et ux.* v. *Southern Pac. Co.*, 169 F. (2d) 42 (10th Cir. 1948). Each of these cases was decided after the effective date of Rule 41(b). Each involves the conclusion that that Rule did not affect the nature of a dismissal grounded on the statute of limitations.

In holding that dismissal of the complaint at bar "operates as a final adjudication of the merits of the controversy" (Appendix, p. 4a), the court below appears to have converted what had been a purely procedural defense barring suit in the particular forum into a substantive defense barring suit on the merits everywhere. If that interpretation of Rule 41(b) be correct, grave questions are presented as to the power of this Court to formulate such a Rule affecting substantive rights. Section 2072 of Title 28, United States Code, the statutory authority for formulation of the Federal Rules by this Court, specifically provides that the Rules "shall not abridge, enlarge or modify any substantive right." See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, and *United States* v. *Sherwood*, 312 U. S. 584. In the case at bar, the substantive right is respondent's heretofore unquestioned right to commence another action in another jurisdiction where the statute of limitations had not run, if any such jurisdiction were available.

We submit that the court below has engrafted an improper construction on Rule 41(b). The most that respondent is entitled to is an order of dismissal which explicitly recites that it is "without prejudice."* Cf. *Smith* v. *Ford Gum & Machine*

*We believe that the order of dismissal in the District Court already shows, upon its face, that it is based upon the limitations defense and thus is without prejudice. See order in Appendix, page 65a. If, however, there is any doubt on the matter, the proper procedure would seem to be to amend the order, not to order a new trial.

Co., 212 F. (2d) 581 (5th Cir. 1954). To grant respondent a new trial because of a claimed error in the form of the judgment would be an unreasonable and illogical elevation of form over substance.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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